Supreme Court, U.S.
FILED

03 410 SEP 11 2003

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CORDELL MILLER,

Petitioner,

KENNETH WILSON,

Intervenor

v.

TYSON FOODS, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Kenneth Wilson
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HTTP

QUESTIONS PRESENTED

1. May a United States district court constitutionally totally exclude a licensed attorney from admission to practice in the district court, on both a *pro hac vice* basis and general admission basis, based upon the fact that the attorney resides in the state wherein the district court sits, but is licensed by another state?

2. May a federal trial court judge constitutionally issue an order denying counsel's lien after a Notice of Appeal to the court of appeals has been filed, without ever holding a due process hearing on the issue and the counsel's professional legal services which are the subject of the lien were performed while counsel had been granted *pro hac vice* status by the trial judge?

3. Where the district court enters an Order excluding counsel from admission to the practice in the district court, may the circuit court constitutionally deny counsel's motion to intervene and appear at oral argument to present the constitutional law issues to which he is the real party in interest?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Intervenor, counsel Kenneth Wilson, respectfully prays that a *writ of certiorari* issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States district court appears at Appendix F to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided the case was June 19, 2003. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the privileges and immunities clause of the U.S. Constitution, the supremacy clause of the U.S. Constitution, the equal protection clause of the U.S. Constitution, the due process clause of the U.S. Constitution, and local rule 83.1 of the U.S. District Court for the Northern District of Alabama.

STATEMENT

The petitioner, through counsel Hycall Brooks, filed his Complaint initiating this action on March 21, 2001. The respondent filed its Answer on April 23, 2001. On July 17, 2001, counsel Hycall Brooks filed a motion to withdraw, which was granted on August 20, 2001. On October 22, 2001, counsel Kenneth Wilson filed a motion for admission *pro hac vice* in the above-styled case. Counsel Kenneth Wilson was admitted *pro hac vice* in the above-styled action on October 23, 2001.

On March 4, 2002, counsel filed a motion for an extension of the discovery and dispositive motion deadlines, on behalf of petitioner because there was a period of time wherein petitioner was not represented by counsel and was proceeding *pro se.* The original motion document was inadvertently mailed as a service copy to counsel for the respondent, Peyton Lacy, Jr., Esquire and Brian Bostick, Esquire at Ogleetree, Deakins, Nash, Smoak, & Stewart, P.C., and the service copy of the motion was inadvertently retained and filed by the United States district court clerk. On March 15, 2002, the court entered a Memorandum Opinion and Order denying petitioner's motion for extension and directing counsel, Kenneth Wilson, to show cause in writing by close of business on March 22, 2002, why the previous Order granting *pro hac vice* status should not be vacated. The court stated counsel, "should not have been admitted *pro hac vice* if he, in fact, is or holds himself out to be a resident of Alabama. He lists himself with a residence or business address of 301 Beacon Crest Lane, #7, Birmingham, Alabama 35209, and with a telephone number of (205) 290-0115."[1]

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[1] However, there is evidence that an *ex parte* conversation between counsel for the respondent and United States district judge Acker was the basis of the challenge to Wilson's *pro hac vice* status. The *en banc* hearing transcript demonstrates that district judge Hancock stated, "[b]eing the way that Mr. Wilson has conducted himself in this proceeding here today, I think its very important to note that, Mr. Lacey, you would probably be guilty of malpractice representing Tyson if you didn't do everything you could to get him out of this case." (Transcript p. 48). This conclusion is further supported by a statement by counsel for defendant, Brian Bostick, to Kenneth Wilson after the *en banc* hearing, wherein counsel Bostick stated that his co-counsel, Peyton Lacey, Jr., had a telephone conversation with judge Acker reiterating a point he'd made at the *en banc* hearing. Furthermore, the respondent's own motion for leave to file initial brief and evidence in support of its motion for summary judgment documents another instance of *ex parte* conversations between defense counsel and the judge's office. The respondent states in paragraph 2 thereof, "[a]s the discovery deadline approached, **Defense counsel contacted Court's chambers** and inquired as to how to proceed with the filing of Defendant's Motion for Summary

On March 18, 2002, counsel for petitioner, Kenneth Wilson, filed a response to the court's show cause Order arguing that the U.S. District Court for the Northern District of Alabama local rule 83.1(b) is unconstitutional, as applied to him on the grounds that it is: (1) a violation of the dual/separate sovereignty doctrine, and (2) a violation of the Equal Protection clause. Petitioner contemporaneously, filed a renewed motion for extension of discovery and dispositive motion deadlines.

On March 21, 2002, petitioner, through counsel, filed a motion to consolidate petitioner's action into the lawsuit styled *Brenda Gilbert v. Tyson Foods, Inc.* CV-98-C-2306-S. The Consent Decree by Judge U.W. Clemon, which settled the *Gilbert* matter, entered on July 9, 1999, provided in Section III (A), in pertinent part that, "[t]his Court will retain jurisdiction over this injunction for three years from the date of this Decree, subject to the provisions of Section III (F) below, so that any disputes arising out of the administration of this Decree can be resolved." Furthermore, the Consent Decree at section IV(C)(4)(a) specifically grants employees the option of exercising their rights under Title VII by pursuing their claims through the EEOC and exercising whatever other remedies exist within the state and federal court systems." The petitioner in this case exercised his option to pursue his claim through the E.E.O.C., as provided by the Consent Decree.

Judgment and its accompanying brief and evidence. Defendant's counsel was advised that, given the additional circumstances regarding the *pro hac vice* issue, the defendant should file only the actual Motion for Summary Judgment and that a briefing schedule providing for the submission of briefs and evidence would later be entered once the issues surrounding the *pro hac vice* application were resolved." The petitioner's counsel was not a party to this conversation.

The respondent, through counsel filed an opposition to the motion to consolidate on March 25, 2002. On April 10, 2002, counsel Kenneth Wilson filed a supplemental response to the court's March 15, 2002 show cause order raising the Privileges and Immunities clause as well. On April 11, 2002, an *en banc* hearing before the United States district judges of the U.S. District Court for the Northern District of Alabama was held presenting the issue of the constitutionality, as applied to attorney Kenneth Wilson, of the court's local rule 83.1 governing *pro hac vice* admission.

On April 15, 2002, the respondent filed a motion for summary judgment. On April 16, 2002, judge Acker entered an Order that the pending motion for summary judgment would not be scheduled or ruled upon until the question of counsel Kenneth Wilson's entitlement to represent petitioner was resolved. On April 26, 2002, counsel Kenneth Wilson in order to ensure ripeness of the issues filed an application for admission to practice in the U.S. District Court for the Northern District of Alabama. The application was denied by letter dated June 12, 2002. On April 29, 2002, counsel Kenneth Wilson filed a supplemental response to the court's inquiry during the *en banc* hearing asserting that this case involves infringement of a fundamental right pursuant to the holding of *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 150 S.Ct. 1272, 84 L.Ed.2d 205 (1985) and therefore invokes strict scrutiny analysis.

Counsel Kenneth Wilson is admitted to practice before the United States District Court for the Southern District of Ohio, United States Court of Appeals for the Sixth Circuit, United States Court of Appeals for the Eleventh Circuit and the United States Supreme Court.

On May 3, 2002, U.S. district court judge William M. Acker entered a Memorandum Opinion and Order in *Miller v. Tyson Foods, Inc.*, CV-01-AR-0701-S (N.D. Ala), wherein Judge Acker vacated counsel's previously granted *pro hac vice* status. In the Memorandum Opinion and Order, judge Acker found that, "[l]ocal rule 83.1(b) is, in all respects, constitutional and otherwise valid in its application to Wilson." The judge stated in his Memorandum

Opinion, "[t]he court will not write a detailed opinion stating a rationale for the conclusion that it has reached above, that is, unless it is called upon to do so by the Court of Appeals in response to an anticipated petition for *writ of mandamus* if one is filed by Wilson and/or Miller." Further, judge Acker stated, "Miller's pending motion for consolidation of this case with an older case assigned to Chief Judge Clemon shall be presented to Chief Judge Clemon." (App. E).

Thereafter, petitioner's counsel, Kenneth Wilson filed a notice of lien for professional services rendered in the amount of $9,201.55 on May 6, 2002. Counsel Victor R. Spencer filed a notice of appearance on behalf of petitioner on May 21, 2002. The petitioner, through counsel Wilson filed an interlocutory appeal/appeal/*writ of mandamus* on May 10, 2002. On May 13, 2002, judge Acker entered an Order purporting to strike the petitioner's appeal. The Eleventh Circuit Court of Appeals in Appeal No. 02-12694-*F sua sponte* declined to treat petitioner's appeal as an interlocutory appeal or as a *writ of mandamus* and dismissed the appeal on July 12, 2002 on the grounds that judge Acker's May 3, 2002, Memorandum Opinion and Order did not constitute a final appealable order (App. D).

On August 8, 2002, judge Acker entered an Order denying petitioner's motion to consolidate without having held a due process hearing or apparently having presented the case to chief judge U.W. Clemon, as he stated in the May 3, 2002 Memorandum Opinion and Order would be done.[2] Petitioner, through counsel, filed an opposition to the respondent's motion for summary judgment and an incorporated motion for summary judgment for the petitioner on August 23, 2002. The petitioner, in order to assure that judge Clemon had an opportunity to rule on his motion to consolidate, filed the motion directly before judge Clemon under the *Gilbert* case number. On September 11, 2002, judge Clemon, without having

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[2] Judge Acker's Order did not provide any indication that the case had been presented to chief judge U.W. Clemon to rule on the question of consolidation. Judge Clemon had an injunction/consent decree in effect, which governed the Plaintiff's cause of action.

held a due process hearing or providing any rationale denied petitioner's motion to consolidate.

On September 16, 2002, without having held a due process hearing, judge Acker entered a Memorandum Opinion and Order granting summary judgment to the respondent. (App. F). The petitioner filed a *pro se* notice of appeal and motion to proceed *in forma pauperis* on October 15, 2002. On October 17, 2002 judge Acker entered an Order, wherein he acknowledged that the petitioner met the requirements to proceed *in forma pauperis*; yet, purported to deny the motion. In the Order judge Acker stated,

> [a]lthough the court is satisfied that Mr. Miller lacks the financial capability of paying the filing fee and other costs associated with an appeal, his appeal is so lacking in colorable merit and so obviously an attempt to reopen his case after the expiration of the time for a motion for new trial pursuant to Rule 59, F.R.C.P., that the court respectfully DENIES Mr. Miller's request for *in forma pauperis* status.

(App. H).[3] The petitioner, through counsel Spencer, on October 16, 2002, filed a renewed notice of appeal and paid the filing fee.

After the appellate briefs had been completed and filed during the pendency of the appeal in the circuit court, petitioner, Cordell Miller, on March 12, 2003 petitioned the court of appeals to terminate counsel Kenneth Wilson as his representative, which motion was granted the very next day, March 13, 2003. It was at this point that it became necessary for counsel Wilson to seek intervention as a real party in interest to present the issue previously

[3] Pursuant to F.R.A.P. 3, the trial court's duty once a notice of appeal is filed is simply to accept the notice of appeal and any filing fee on behalf of the 11th Circuit Court of Appeals. Thus, the sole issue before the trial court was whether petitioner was able to afford to pay the filing fee. The trial court's Order admits that the petitioner could not afford to prosecute the appeal, yet the trial judge still unjustly denied the petitioner's motion to proceed *in forma pauperis*.

set forth in the appellate brief regarding the constitutionality of the trial court's exclusion of his ability to practice in the United States district court.

Counsel Wilson on April 24, 2003, filed a motion pursuant to Fed.R.Civ. P. 17(a), to attend and argue the constitutional law issue at oral argument. Subsequently, prior to oral argument petitioner Miller contacted Mr. Wilson to represent him on the appeal and counsel was reinstated as counsel of record on May 7, 2002. The circuit court, however, by Order dated May 13, 2002, stated that counsel "may appear at oral argument only to argue the issues that are relevant to his client's appeal"- thereby effectively dismissing the important constitutional question regarding the trial court's exclusion of counsel Wilson which had been presented in petitioner's appeal and fully briefed by both parties (App C). The circuit court denied counsel's motion to intervene initially and on reconsideration (App.s B, C).

Oral argument was held on June 5, 2003. The U.S. Court of Appeals for the Eleventh Circuit on June 19, 2003, entered a *per curiam* opinion which affirmed the decision of the district court. The circuit court in affirming the judgment of the trial court ruled that, 1) the district court did not abuse its discretion in refusing to consolidate petitioner's case with the *Dumas* litigation in which a consent decree had been entered; 2) the petitioner's challenge of the trial court's refusal to allow him to proceed on appeal *in forma pauperis* was not reviewable and 3) that the issues regarding the constitutionality of the exclusion of counsel Kenneth Wilson to practice in the district court (issues raised by counsel allegedly on his own behalf) were not properly before the court (App. A).

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE PREREQUISITES TO ADMISSION TO PRACTICE IN A FEDERAL COURT.

This Court should grant *certiorari* in this case for several compelling reasons. In this case a United States court of appeals has failed to address the fundamental and important constitutional question whether a U.S. district court may totally exclude a licensed attorney who is a citizen of the sovereign of the United States of America from admission to practice in the district court on both a *pro hac vice* and general admission basis because counsel resides in the state wherein the district court sits, but is licensed by a different state. The U.S. District Court for the Northern District of Alabama Local Rule 83.1, as interpreted in this case violates the United States Constitution in several regards. The exclusion of counsel violates *inter alias,* the separate sovereign doctrine, the privileges and immunities clause, the supremacy clause, the equal protection clause and the due process clause.

There is a split among the circuit courts regarding this issue and this Court should exercise its supervisory authority to resolve this issue.

The circuit court erroneously held, "[t]he issues Miller's counsel has attempted to raise on his own behalf are not properly before the court." (App. C) However, a review of the record demonstrates that the circuit court has taken every opportunity to avoid addressing the important constitutional question presented by this case. The trial judge stated that "[t]he court will not write a detailed opinion stating a rationale for the conclusion that it has reached above, that is, unless it is called upon to do so by the Court of Appeals in response to an anticipated petition for *writ of mandamus* if one is filed by Wilson and/or Miller". The trial court did not provide any rationale for its exclusion of counsel Kenneth Wilson and refused a request to approve the case for 28 U.S.C. § 1292(b) certification. Plaintiff timely filed an interlocutory appeal/*writ of mandamus*/appeal on May 10, 2002. Subsequently, after the trial court had been ousted of

jurisdiction by the petitioner's notice of appeal, on May 14, 2002, district judge Acker, without having held a due process hearing entered an Order purporting to strike the plaintiff's appeal as well as attorney Kenneth Wilson's Notice of Lien. (App. G). The Eleventh Circuit Court of Appeals *sua sponte* dismissed the appeal for lack of jurisdiction and refused to treat it as an interlocutory appeal or petition for a *writ of mandamus* on June 11, 2002 in contradiction to the holding of *U.S.A. v. Bowman*, (11th Cir. Aug. 13, 2003) 2003 U.S.App. LEXIS 16629. In *Bowman,* the court stated that it has jurisdiction, only if the facts of the case fit the injunction analogy theory, which treats an interlocutory order as the functional equivalent of an injunction under 28 U.S.C. § 1291(a)(1), or the collateral order doctrine. Both theories require that the order at issue be effectively unreviewable on appeal after final judgment." In the case *sub judice*, judge Acker's Order revoking counsel Wilson's *pro hac vice* status has met this requirement as the circuit court has taken every opportunity to not address this issue.

The record demonstrates that counsel Wilson had previously filed an interlocutory appeal-appeal-*writ of mandamus,* as set forth *supra,* which the court of appeals dismissed *sua sponte* in appeal number 02-12694F. (App. D). Furthermore, the petitioner's appeal information sheet to the appeal from the final judgment in this case 11th Cir. App. No. 02-15709, delineated that the constitutional law issue would be presented upon the appeal. Also, the petitioner and the respondent each fully briefed the constitutional issue in their appellate briefs.

The sixth circuit and the ninth circuit have addressed similar issues in the context of bankruptcy court- a division of the district court and have each ruled that foreign counsel could not constitutionally be denied the ability to practice in federal court. (See *In re Mary Poole*, 222 F.3d 618 (9th Cir. 2000) and *In re Ernest J. Desilets*, 291 F.3d 925 1020 (9th Cir 2000)). Additionally, in *Theard v. United States*, 354 U.S. 278, 1 L.Ed. 2d 1342, 77 S.Ct. 1274 (1957), the United States Supreme Court held that admission to practice law before a state's courts and admission to practice before the federal courts in the same state are separate, independent privileges. "The two judicial systems of courts, the state judicatures

and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included." Id. The circuit court's contention that the issues were "personal" to counsel Wilson merely demonstrated that he had standing.

The circuit court's contention that the constitutional law issues presented by this case were not properly before the court is erroneous as the evidence shows that the circuit court was presented with the opportunity to review the issues as 1) an interlocutory appeal, 2) as a *writ of mandamus*, 3) as a direct appeal and 4) as a motion to intervene as the real party in interest. The first duty of the federal court is to support and defend the constitutional of the United States of America, as evidenced by the oath of office of federal judges. It is the duty of the federal judiciary to interpret the law. This case presents a constitutional question of great magnitude and the courts below, the U.S. District Court for the Northern District of Alabama and the U.S. Court of Appeals for the Eleventh Circuit have refused to provide any rationale for their action and have taken every measure to avoid addressing this serious constitutional question.

The circuit court's ratification of the trial court's interpretation of its local rules of admission in this case violate several rulings from this Court and those of the sixth and ninth circuit courts of appeal, which have addressed similar questions in bankruptcy cases. Therefore, there is a split among the circuit courts of appeal concerning this important constitutional issue that this Honorable Court should resolve. (*See Theard v. United States,* 354 U.S. 278, 1 L.Ed.2d 1342, 77 S.Ct. 1274 (1957)(holding that admission to practice law before a state's court's and admission to practice before the federal courts in that state are separate, independent privileges); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 150 S.Ct. 1272, 84 L.Ed.2d 205 (1985)(holding New Hampshire rule 42 violated the privileges and immunities clause); *In re Mary Poole*, 222 F.3d 618 (9th Cir. Aug 25, 2000) 2000 U.S. App. LEXIS 21440 (where the judgment of the Bankruptcy Appellate Panel denying plaintiff's motion to disgorge fees was affirmed on finding the defendant, unlicensed by the state bar, was properly admitted to

practice in federal district court and thus could not be denied fees under federal law); *In re: Ernest J. Desilets*, 291 F.3d 925 (6th Cir. Jun 3, 2002) 2002 U.S. App. LEXIS 10583 (where the court found that because counsel was properly admitted to the federal bar under the applicable rule, and because the federal standards govern practice before the federal bar, the court rejected the bankruptcy court's determination as adopted by the district court disallowing counsel's fees).

Fed. R. App. P. 46, sets forth the proper guideline for admission to the courts of appeals without regard to any residency requirement. F.R.A.P. 46 provides,

> [a]n attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands)"

Admission to a district court likewise should not contain any state residency restrictions.

II. THE QUESTIONS PRESENTED ARE IMPORTANT

The circuit court should have heard the constitutional law question as it is an issue of great public interest and importance. The application and interpretation of the United States constitutional provision to such an important issue warrant presentation, due process and judicial resolution. It is not that the issue was "personal" to counsel Wilson, as stated by the circuit court; but rather, it is so important to our constitutional jurisprudence. Further, the fact that the issue may be important to counsel Wilson serves only to establish that counsel has "standing" to argue the issue.

The constitutional question presented by this case appears to be an issue of first impression in the Eleventh Circuit Court of Appeals.

It is an important issue and is capable of repetition, escaping review and has significant national implications.

III. THE DECISIONS OF THE COURT OF APPEALS ARE ERRONEOUS

The circuit court in affirming the decision of the trial court condoned and ratified the many errors that occurred in the trial court. The lower courts in this case so far departed from the accepted and usual course of judicial proceedings by denying counsel the ability to represent the petitioner, denying counsel's motion to intervene and appear at oral argument to present the constitutional law issues to which he is the real party in interest, purporting to strike petitioner's appeal, denying petitioner the ability to proceed on appeal *in forma pauperis*, and striking counsel's lien for professional services provided while counsel had been granted *pro hac vice* status, that the action of the courts below can not be allowed to stand.

The trial court denied counsel's lien for professional services rendered during the time that he had been granted *pro hac vice* status. Counsel Kenneth Wilson expended sixty-seven (67) hours in the prosecution of petitioner's cause of action, including attendance and participation at two depositions and payment for the costs of court reporter transcripts, thereof (App. G). The trial judge's action, in issuing an order after the notice of appeal had been filed in this matter, thereby divesting the trial court of jurisdiction, was clearly erroneous and contrary to law. The Court's actions were arbitrary and capricious. The order was void *ab initio*, as having been entered after the notice of appeal was filed. The trial court did not have jurisdiction to enter the order. The trial judge's action produced a deprivation of property without due process of law in violation of the Fifth Amendment to the United States Constitution. The Fifth Amendment to the United States Constitution provides in pertinent part that, "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law."

Counsel Wilson is a licensed attorney and provided competent legal services to the petitioner in this matter. During the time the services were rendered, counsel had approved *pro hac vice* status

from the U.S. district court. Therefore, counsel's lien for services and cost advanced on the client's behalf was due to be honored. In denying petitioner's motion to proceed on appeal *in forma pauperis*, the trial court ignored the law in an effort to stifle the petitioner's ability to exercise his constitutional rights. The trial court's order stated,

> [a]lthough the court is satisfied that Mr. Miller lacks the financial capability of paying the filing fee and other costs associated with an appeal, his appeal is so lacking in colorable merit and so obviously an attempt to reopen his case after the expiration of the time for a motion for new trial pursuant to Rule 59, F.R.C.P., that the court respectfully DENIES Mr. Miller's request for *in forma pauperis* status.

(App. H). The sole issue before the trial court was whether petitioner was able to afford to pay the filing fee. The trial court's Order admits that the petitioner could not afford to prosecute the appeal, yet the trial judge still unjustly denied the petitioner's motion to proceed *in forma pauperis* in violation of the petitioner's constitutional due process rights.

The circuit court stated in its May 13, 2003, Order, "Mr. Wilson could have filed a Notice of Appeal from the District Court's Order vacating its order allowing Mr. Wilson to appear pro hac vice upon entry of the judgment below." However, in fact, when the petitioner's Notice of Appeal was filed with the circuit court the issue of the constitutionality of the district court's interpretation of its local rule of admission was presented as an issue on appeal and was briefed by both the petitioner and the respondent. It was not until the appellate issues had been fully briefed by both sides that the petitioner, Cordell Miller, on March 12, 2003, petitioned the court of appeals to terminate counsel Kenneth Wilson as his representative, which motion was granted the very next day, March 13, 2003. It was at this point that it became necessary for counsel Wilson to seek intervention as a real party in interest to present the issue previously set forth in the appellate brief regarding the constitutionality of the trial court's exclusion of his ability to practice in the United States district court.

Counsel Wilson on April 24, 2003, filed a motion pursuant to Fed.R.Civ. P. 17(a), incorporating Fed.R.Civ.P. 15's relation back doctrine, to attend and argue the constitutional law issue at oral argument. Subsequently, prior to oral argument petitioner Miller contacted Mr. Wilson to represent him on the appeal and counsel was reinstated as counsel of record on May 7, 2002. The circuit court, however, by Ordered dated May 13, 2002, stated that counsel "may appear at oral argument only to argue the issues that are relevant to his client's appeal"- thereby effectively dismissing the important constitutional question regarding the trial court's exclusion of counsel Wilson (App. C).

Furthermore, after counsel's request for 28 U.S.C. § 1292(b) certification was denied by the district judge, petitioner timely filed an interlocutory appeal/*writ of mandamus*/appeal on May 10, 2002. Thereafter, after the trial court had been ousted of jurisdiction by the petitioner's notice of appeal, on May 14, 2002, United States district judge Acker, without having held a due process hearing entered an Order purporting to strike the plaintiff's appeal as well as attorney Kenneth Wilson's Notice of Lien. (App. G). The Eleventh Circuit Court of Appeals *sua sponte* dismissed the appeal for lack of jurisdiction and refused to treat it as a an interlocutory appeal or petition for a *writ of mandamus* on June 11, 2002 (App. D).

The circuit court should have heard the constitutional law question, as it is an issue of great public interest and importance and was presented and fully briefed on appeal in the petitioner's and respondent's appellate briefs. Rather the circuit court denied counsel's motion to intervene initially and on reconsideration (App.s B, C).

The circuit court's actions denied counsel's constitutional right to present the important constitutional law issue in this case, when the court had been presented with four separate opportunities to hear this issue. The circuit court had the issues presented as 1) an interlocutory appeal, 2) as a *writ of mandamus*, 3) as a direct appeal and 4) as a motion to intervene as the real party in interest. The issue was presented in the original notice of appeal as well as in the

Fed.R.Civ. P. 17 motion, which pursuant to Fed.R.Civ. P. 15 related back; therefore, the circuit court erred in refusing to hear the important constitutional issue regarding the local rules of admission to the district court.

CONCLUSION

The constitutional law issues regarding the district court admission rules have great and significant implication throughout the entire federal judiciary of this country and are ripe for definitive resolution by this Honorable Court. For all the foregoing reasons, petitioner respectfully requests that this Court grant the *writ of certiorari* in this case.

Respectfully submitted,

Kenneth Wilson

Kenneth Wilson
Date: September 11, 2003

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-15709

District Court Docket No.
01-00701-CV-AR-S

CORDELL MILLER,

Plaintiff-Appellant,

versus

TYSON FOODS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	June 19, 2003
For the Court:	Thomas K. Kahn, Clerk
By:	Gilman, Nancy

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15709

D. C. Docket No. 01-00701-CV-AR-S

CORDELL MILLER,

Plaintiff-Appellant,

versus

TYSON FOODS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(June 19, 2003)

Before EDMONDSON, Chief Judge, CARNES, Circuit Judge, and CARNES*, District Judge.*

PER CURIAM:

Cordell Miller appeals the district court's entry of summary judgment against him in his lawsuit against his former employer, Tyson Foods, Inc. After considering the briefs and the pertinent parts of the record and hearing oral argument, we are convinced that the judgment is due to be affirmed. The district court did not abuse its discretion in refusing to consolidate this case with the Dumas litigation in which a consent decree had been entered. Miller failed to establish a genuine issue of material fact concerning his Title VII

* Honorable Julie E. Carnes, United States District Judge for the Northern District of Georgia, sitting by designation.

claims, and Tyson was entitled to judgment as a matter of law on those claims. His contention that the district court should have allowed him to proceed in forma pauperis is not reviewable on appeal. The issues Miller's counsel has attempted to raise on his own behalf are not properly before this Court.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

02-15709-HH

D. C. Docket No. 01-00701-CV-AR-S

CORDELL MILLER,

Plaintiff-Appellant,

versus

TYSON FOODS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before EDMONDSON, Chief Judge, CARNES, Circuit Judge, and CARNES*, District Judge.*

BY THE COURT:

Kenneth Wilson's "Motion/Petition for Reconsideration" is DENIED.

Appendix B

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* Honorable Julie E. Carnes, United States District Judge for the Northern District of Georgia, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

02-15709-HH

D. C. Docket No. 01-00701-CV-AR-S

CORDELL MILLER,

Plaintiff-Appellant,

versus

TYSON FOODS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

Now pending before the Court is a "Motion to Participate in Scheduled Oral Argument," filed by Appellant's counsel Kenneth Wilson. The motion asks this Court to find that Mr. Wilson is a real party in interest in this appeal, and so, this motion is also construed as a request to intervene.

Mr. Wilson could have filed a Notice of Appeal from the District Court's Order vacating its order allowing Mr. Wilson to appear pro hac vice upon entry of the judgment below.

Accordingly, to the extent that Mr. Wilson seeks to intervene his motion is DENIED. To the extent that Mr. Wilson seeks to participate in oral argument to argue issues that are personal to him, his motion is DENIED.

Mr. Wilson may appear at oral argument to argue issues that are relevant to his client's appeal.

S/CHIEF JUDGE

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12694-FF

CORDELL MILLER,

Plaintiff-Appellant,

versus

TYSON FOODS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before ANDERSON, BIRCH and DUBINA, Circuit Judge.

BY THE COURT:

This appeal is DISMISSED, sua sponte, for lack of jurisdiction. The district court's May 3, 2002, memorandum opinion and order vacating its earlier order and denying appellant's application for leave to appear pro hac vice is not final and appealable. 28 U.S.C. §§1291, 1292; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949): Atlantic Federal Sav. & Loan Ass'n v. Blythe Eastmatn Paine Webber, Inc., 890 F.2d 371, 375-76 (11th Cir. 19889); Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir.), cert. denied, 464 U.S. 893 (1983); Broussard v. Lippman, 643 F.2d 1131, 1133 (5th Cir. Unit A Apr. 1981), cert. denied,452 U.S. 920 (1981). We decline to consider the notice of appeal as a petition for writ of mandamus.

Appendix D

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 288-89, 108 S.Ct. 1133, 1142-43, 99 L.Ed. 2d 296 (1988).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir. R. 40-3 and all other applicable rules.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CORDELL MILLER,	}	
	}	
Plaintiff,	}	
	}	CIVIL ACTION NO.
	}	
	}	01-AR-0701-S
TYSON FOODS, INC,	}	
	}	
Defendant.	}	

MEMORANDUM OPINION AND ORDER

On March 15, 2002, this court ordered Kenneth Wilson ("Wilson"), to show cause, if he can do so, why the order admitting him *pro hac vice* as attorney for plaintiff, Cordell Miller ("Miller"), in the above-entitled case should not be vacated. In response, Wilson filed a memorandum brief, two supplemental briefs and appeared in person for an *en banc* hearing conducted on April 11, 2002. The inquiry was occasioned by the fact that Wilson lists 301 Beacon Crest Lane, #7, Birmingham, Alabama, as his address, nut is not licensed in this court.

The local rules promulgated by the Northern District of Alabama, if valid, do not allow Wilson's *pro hac vice* admission. The pertinent rule reads as follows:

> Appearance *Pro Hac Vice*. Any attorney who is not a member of this court but who is admitted to practice before the United States District Court for the district in which (or before the highest court in the state in which) such person resides or regularly practices law, may, upon request and payment of the prescribed fee (unless payment is waived by special order of the court), be allowed to appear in a

Appendix E

case *pro hac vice* by an order of any district judge or bankruptcy judge of this court.

Local Rule 83.1(b).

This rule did not become effective until it had been approved by the Court of Appeals for the Eleventh Circuit. Insofar as this court has been able to ascertain, the constitutionality of the rule has not been challenged until now.

The Pertinent Facts

In addition to the fact that Wilson, who is a lawyer employed in Birmingham, Alabama, by a federal agency, advertises himself as having an Alabama professional address, he concedes that he is a *bona fide* resident of Alabama. It also appears without contradiction that he has been admitted to practice by the Supreme Court of Ohio and is in good standing as a lawyer in Ohio. The Supreme Court of Ohio is the highest court in Ohio, Wilson's former state of residence. Wilson is not admitted to practice by the Supreme Court of Alabama or by the Northern District of Alabama. Not only does he no longer reside in Ohio, but he does not regularly practice law there. He contends that he is entitled to represent litigants in this court on a *pro hac vice* basis because one or more provisions of the United States Constitution render Local Rule 83.1(b) invalid in application to him.

Wilson admits that his admission *pro hac vice* here will not be permitted if Local Rule 83.1(b) is enforced by its unambiguous language. In other words, if Local Rule 83.1(b) is valid, this court inadvertently and erroneously admitted Wilson *pro hac vice* and should vacate the order admitting him for the limited purpose of representing plaintiff in this case.

The Need for an Expeditious Ruling on the Validity of Local Rule 83.1(b)

Both Wilson and Miller deserve to know promptly whether or not Wilson will be allowed to continue as attorney for Miller before the case progresses further.

The undersigned is, in effect, a "sole practitioner". Each new case filed in the Northern District of Alabama is assigned to a single judge, that is except for cases in which a three judge panel must be convened. Although all district judges, magistrate judges and bankruptcy judges of the Northern District of Alabama have an interest in the efficacy of the local rules, the court does not operate as a monolith. Neither does it operate like an appellate court, where majority rules. The undersigned, to whom this particular case has been assigned, necessarily proceeds to rule, and is responsible for ruling, on the issue before it without awaiting any formal expression from other judges who may or may not have their own ideas on the subject at hand. Some of the other judges of this court have before them the identical question involving Wilson's status, and some do not. NO other judge of this court has orally expressed to this judge any doubt about the constitutionality of Locla Rule 83.1(b). The fact that an *en banc* hearing was conducted does not mean that an *en banc* opinion is necessary.

The Ruling

Wilson challenges Local Rule 83.1(b) as an alleged violation of "equal protection", as an alleged undue interference with "interstate commerce", as an alleged violation of what he calls the "dual sovereignty doctrine", and as an alleged violation of his "privileges and immunities." This court respectfully disagrees with Wilson on each and all of his theories, and finds them to be without merit. To the contrary, the court finds that Local Rule 83.1(b), is, in all respects, constitutional and otherwise valid in its application to Wilson. In other words, in this court's opinion, Wilson has failed to meet the burden of showing why his *pro hac vice* admission should not be vacated.

The court will not write a detailed opinion stating a rationale for the conclusion that it has reached above, that is, unless it is called upon to do so by the Court of Appeals in response to an anticipated petition for writ of mandamus if one is filled by Wilson and/or Miller.

Consistent with the foregoing, the earlier order that granted Wilson *pro hac vice* status is hereby VACATED, and his application for leave to appear *pro hac vice* is DENIED. **The clerk is**

DIRECTED to return the fee which accompanied Wilson's application. Miller shall proceed *pro se* in this case unless he obtains counsel licensed to practice in this court **within twenty (20) days**. Meanwhile, all obligations of the parties are SUSPENDED. Miller's pending motion for consolidation of this case with an older case assigned to Chief Judge Clemon shall be presented to Chief Judge Clemon. **The Clerk shall mail a copy of this order to Miller at his residence address.**

DONE this 3rd day of May, 2002

S/ William M. Acker
United States District Judge

cc: All district judges, magistrate judges and bankruptcy judges.

IN THE UNDITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CORDELL MILLER,	}	
	}	
Plaintiff,	}	
	}	CIVIL ACTION NO.
	}	
	}	01-AR-0701-S
TYSON FOODS, INC,	}	
	}	
Defendant	}	

MEMORANDUM OPINION

Before the court is a motion for summary judgment filed by defendant, Tyson Foods, Inc. ("Tyson"), and a motion for summary judgment filed by plaintiff, Cordeli Miller ("Miller"). Miller, an African-American male, contends he was subjected to a hostile work environment on the basis of race, sex, and in retaliation for filing an EEOC charge. Miller also contends that the retaliatory treatment by Tyson resulted in his constructive discharge. He asserts these claims under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.

Statement of Undisputed Pertinent Facts

Miller began working for Tyson at its Blountsville plant in 1997. He worked as a general laborer until he resigned in January of 2001. On March 16, 1998, Miller filed an EEOC charge against Tyson alleging that he had been harassed on the basis of his sex and race. Miller's complaint was merged with claims asserted by other employees at the Blountsville plant which were pending before the United States District Court in *Dumas v. Tyson*, CV-93-C-2688-S. On July 9, 1999, Chief Judge U.W. Clemon entered a Consent Decree that resolved all of the claims brought by Miller and the

the other plaintiffs in that case.

After the earlier claims against Tyson were resolved through the 1999 Consent Decree Miller began keeping detailed handwritten notes about every incident that he felt worthy of recording. Miller assumed that retaliation would be forthcoming even though no one at Tyson told him he would be the object of retaliation or threatened him. Miller states, "I knew I would be retaliated against when I went back to the plant . . . [T]hat's why I kept my pad and pencil with me everywhere I went so whenever something happened, I wrote it down."

Miller's notes describe several incidents he contends constituted harassment/retaliation. Miller concedes that he has no evidence to suggest that any of the employees about whom he complained even knew that he had prior legal claims against Tyson. Most of the incidents involve confrontations with co-employees; only four involve conduct by supervisors. The summary of incidents is as follows:

1) In July of 1999, a Latino co-worker ignored Miller and blocked his way to his work area.

2) In September of 1999, a different Latino co-worker allegedly called Miller "way." Miller did not know what the word meant in Spanish, but says a co-worker told him that it meant "castrated bull." Miller concedes that the co-worker never called him "way" again after he complained to his supervisor.

3) In November of 1999, Miller was tapped on his hard hat two or three times by a co-worker. That same day a Latino co-worker did not hold the elevator door open for him long enough for him to enter.

4) In November of 1999, someone allegedly opened Miller's locker ands cut off the earplugs on his cap, and another employer sped up the assembly belt line which made the wing tips come into his area, requiring him to work at a brisker pace.

5) In December of 1999, a Latino co-worker allegedly whistled at Miller. The co-worker never whistled at Miller again after the incident.

6) In January 2000,. Miller presented a doctor's excuse to his supervisor stating that he should be allowed to frequently use the

restroom due to a medical condition. Thereafter, Miller's supervisor instructed Miller that he should not be leaving his work area without first notifying his supervisor. No disciplinary action was taken against him for leaving his work station to go to the bathroom.

7) In January of 2000, a Latino co-worker tapped Miller on his hard hat with the butt of a wing tip knife. Miller complained to his supervisor. The co-worker did not tap him on the head again after that one occasion.

8) In February 2000, Miller passed a Hispanic co-worker and said "hi amigo," to which the Hispanic man allegedly responded "hey Americon." Miller claims that "some Mexicans" told him the word "Americon" means faggot or homosexual. He also Contends he was called "punta," which Miller contends means faggot or homosexual in Spanish. Miller never complained to any supervisor about this incident.

9) In February of 2000, Miller went to the nurse's station to ask for some medication. A Latino co-worker whistled at him and told him the nurse might be outside. Miller told the Latino co-worker not to whistle at him again. Miller reported this incident to his supervisor. Miller acknowledged that his supervisor tried to help identify who whistled at him.

10) In August of 2000, Miller was asked by his supervisor to go upstairs in the plant to do some work. Miller refused. No disciplinary action was taken against Miller for his refusing to go to work upstairs. In November of 2000, a supervisor asked Miller to help some other workers on a different line while he had spare time. Miller refused. No disciplinary action was taken against Miller for his refusal to help those other workers.

11) In September of 2000, Miller was tapped on the head with a shovel by a Latino co-worker. Miller complained to a supervisor and had no further problems with the co-worker. In October of 2000, Miller was tapped on the head by another Latino co-worker. Miller complained to his supervisor and had no further problems with this co-worker.

12) In December 2000, Miller had a dispute with Jude Cambray and supervisor, Karie Gaylord. His supervisors asked him to pick up chicken wing tips off the floor. Miller argued that it was not his job to perform the task and said that the supervisors' request constituted "job performance harassment." During the conversation, Miller

referred to Karie Gaylord, who happens to be black, as "brother," and Jude Cambray suggested that Miller's use of the word "brother" constituted a "bias statement." Miller responding by accusing Cambray of being a racist. Miller claims that the supervisors were trying to provoke him to violence.

Tyson's written Harassment Policy provides two methods for employees to make complaints of harassment and retaliation. One method is a toll free hotline. The second method identifies specific Tyson Harassment Investigators who may be contacted. The policy expressly provides in capital letters that: "YOU SHOULD RECOGNIZE THAT IT IS YOUR RESPONSIBILITY OT PERSONALLY MAKE THE REPORT TO ONE OF THE FOLLOWING GROUPS." Miller concedes that he never made any attempt to use either of these two methods to bring to Tyson's attention the conduct about which he complains in this action. He made some verbal complaints to his supervisors but he never contacted a Tyson Harassment Investigator. It was his belief that the supervisors should have been required to draft complaints on his behalf. He contends that his supervisors did not prepare written complaints on his behalf because "they're trying to hide this . . . that way, I wouldn't have any proof when I got into court." Miller admits he never requested a supervisor to fill out a complaint form on his behalf.

The *Dumas* Consent Decree provides a detailed internal complaint procedure for employee to follow. The Consent Decree acknowledges that employees may bypass the internal complaint procedures and go straight to the EEOC. However, it also provides that a plaintiff may suffer adverse legal consequences for failing to use the complaint mechanism provided in the Consent Decree. Miller was familiar with the terms of the Consent Decree. Yet, despite the decree, his training, and the signed notice advising him that it was his responsibility to make the report of harassment to a Tyson Harassment Investigator, Miller chose not to do so. He admits he was aware of the procedures but claims "I didn't have any trust in that."

Analysis

A hostile work environment claim under Title VII is established upon proof that "the workplace is permeated with discretionary intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367. 370, 126 L.Ed.2d 295 (1993). To establish a hostile work environment claim a plaintiff must show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either theory of vicarious or of direct liability. *See, e.g., Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999)(applying these factors in the context of a hostile environment sexual harassment claim).
In order to survive summary judgment, a plaintiff claiming hostile work place harassment must produce evidence that the behavior alleged to constitute unlawful harassment was based on the protected characteristics at issue. *Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001). In order to constitute sexual harassment the statements must be of a sexual or gender-related nature before they are considered in determining whether the severe or pervasive requirement is met. *Id.* at 583.

Tyson asserts that Miller has not produced any evidence to support findings in his favor that the conduct about which he complains wsa directed at him because of his race, sex, or because he filed an EEOC charge. Miller contends that some of the comments made to him suggested he was a homosexual. Miller cites *Ocale v. Sundowner Offshore Service Inc.*, 523 U.S. 75 (1998) as support for his claim that harassment can constitute prohibited sex discrimination under Title VII when the harasser and harassed are the same sex. Although this may be true, harassment based on an employee's homosexuality, as opposed to gender, is not protected under Title VII. Furthermore, the *Oncale* court also stated that "Title VII does not prohibit all verbal or physical harassment in the workplace" and that Title VII is not a "general civility code." *Id.* at 80.

Miller himself testified that the actions directed at him were not based upon his sex or his race. He says instead that the incidents of complaint were in retaliation for his earlier complaints. However, Miller has not produced any evidence that any of the people who committed the allegedly harassing conduct even knew that Miller had filed an EEOC charge or that they had a retaliatory motive. Most of the individuals involved were unidentified Latino co-workers.

Tyson also argues that Miller has not offered any evidence to suggest that the harassment was severe or pervasive. To give rise to a hostile work environment claimant, the harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. *Gupta v. Florida Board of Regents*, 212 F.3d 571, 583 (11th Cir. 2000), that a reasonable person would find hostile and abusive. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999), *cert. denied*, 529 U.S. 1068 (2000). "In deciding whether a hostile environment was created, factors to consider include the frequency of the discriminatory conduct, the severity of the discriminatory conduct, whether the conduct is threatening or humiliating, and whether the conduct unreasonably interferes with the plaintiff's performance at work." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1989).

Miller claims that he was hit on the head by chicken parts thrown by unidentified co-workers, "whistled at," bumped on the head on a few occasions, bumped into by a co-worker and hit by the shovel he was carrying, called "wey," "Amercon," and "punta," having his earplugs cut off his hat after his locker was broken into, reprimanded by a supervisor for using the restroom when Miller had a doctor's excuse and having disputes over job assignments. He states that the conduct was unwelcome and had not been invited or solicited by his own actions or statements. He argues that a reasonable person would have found the workplace to be hostile and that he personally believed the workplace environment was hostile. Miller also claims that the jury finding in 1995 finding that Tyson had a hostile work environment demonstrates that the work environment was viewed as hostile by reasonable persons.

Miller complains of incidents that fall short of what is required to show an objectively hostile work environment. Although the work

environment at Tyson four years ago may have been hostile, the incidents complained of here are trivial and annoying at best. There was no humiliating or threatening conduct, no interference with job performance, and the conduct was not severe. Miller has failed to produce sufficient evidence needed to raise a genuine issue of material fact that his working conditions were intolerable. These events occurred over a period of more than a year and half. Miller took notes and complains about virtually every incident that occurred in the workplace that he disliked.

Miller has produced some evidence to show that he was being treated by a doctor for stress in the workplace. However, Miller has failed to present any evidence that raises a genuine dispute of material fact that the protected characteristics motivated the conduct about which he complains. Furthermore, the incidents Miller complains of are not enough to constitute actionable harassment as a matter of law. Therefore, Tyson is entitled to judgment as a matter of law on the hostile work environment claim.

Assuming *arguendo* that Miller has established a *prima facie* case, Tyson asserts the affirmative defense established in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998). Under *Faragher* and *Ellerth*, the employer is not liable for the hostile work environment created by one of its supervisors if the employer proves: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer to avoid the harm or otherwise failed to avoid the harm. *Ellerth*, 524 U.S. at 765. If an employer has effectively promulgated a workable anti-harassment policy, then it has met its burden under the first element of the *Faragher/Ellerth* defense. *See Faragher*, 524 U.S. at 765; *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000), *cert. denied*, 531 U.S. 926 (2000). The employer must also show that its complain procedure provides multiple avenues for lodging a harassment complaint. *Madray*, 208 F.3d at 1298-99.

Miller tries to distinguish his case from the *Faragher/Ellerth* cases because neither of those defendants was under a previously entered federal injunction, and neither of those defendants had a "zero tolerance" policy in effect as Tyson does. This distinction

actually supports Tyson's motion for summary judgment rather than raises a genuine dispute of material fact.

The first element of the *Faragher/Ellerth* affirmative defense has two sub-parts; prevention and correction. Tyson has clearly met its obligation as to prevention by undisputed proof of its having promulgated and distributed to its employees, including Miller, a valid anti-harassment policy. Miller received training regarding the policy and the complaint procedure. The Consent Decree also provided multiple avenues of complaint and had been court approved. The, Consent Decree clearly fulfilled Tyson's preventive and corrective obligations.

Tyson also argues that it exercised reasonable care to prevent any harassing behavior. Miller's supervisors tried to promptly correct any harassing behavior that may have occurred. On most of the occasions Miller could not even identify the alleged harasser. However, the incidents did not occur again after Miller complained. An employer cannot be expected to correct harassment unless the employee makes an effort to inform the employer the problem exists. *See Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999). These types of vague and informal complaints can hardly place the employer on notice. *See Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000). It is very difficult for an employer to root out racial harassment if the harassed employee does not report the harassment to the employer. Once Miller did make an official complaint during his exit interview to a proper Tyson official as designated under the Consent Decree Tyson conducted a full scale investigation.

The second element of the affirmative defense requires Tyson to prove that Miller failed to take advantage of corrective opportunities afforded him by Tyson. Tyson argues that Miller did not claim he "feared" using the system; he just did not do so because he felt "it was, to me, just seemed like something - - just something set up to benefit Tyson and not for anyone to file a complaint against them. It was just something to basically protect them." Tyson argues, however, that no one from Tyson ever told Miller anything that would lead him to that conclusion and his failure to use the internal complaint procedure was unreasonable as a matter of law.

Miller admitted that he was aware of the fact that Tyson could use his failure to process his complaint under the decree against him.

Miller refused to submit a written complaint to Tyson although he was compiling a year and half's worth of pages of handwritten notes about every single incident that displeased him. Miller claims he made reports to the proper officials but he does not submit any evidence to support this assertion. Once he did complain to the proper officials, on the advice of counsel, he refused to discuss the issue at all with Tyson. Therefore, for purposes of summary judgment, Miller failed to take advantage of the corrective opportunities afforded by Tyson. As a result, Tyson's motion for summary judgment on the hostile work environment claim is due to be granted.

Secondly, Miller alleged he was constructively discharged. To establish a constructive discharge claim, Miller must prove that Tyson rendered his working conditions so intolerable that he was compelled to quit involuntarily. *See Hill v. Winn Dixie, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991). The working conditions must have been so intolerable that a "reasonable person in the employee's shoes would have felt compelled to resign." *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987). Tyson argues that the conduct about which Miller complains is not sufficient to support a hostile work environment claim and it is also insufficient to meet the higher standard required for constructive discharge claims. *See Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208, 1231 (11th Cir. 2001)(The standard for proving a hostile work environment."), *cert. denied*, 122 S.Ct. 1064 (2002). In response, Miller merely states the legal conclusion that he was subjected to such a pervasively hostile work environment that is was adversely affecting his health.

The party opposing summary judgment must set forth specific facts showing that there is a need fro trial. Restating a pleading or making mere conclusory allegations fails to set forth specific facts requiring a need for trial; assertions are not facts. Miller's constructive discharge claim fails fro the same reasons as his hostile work environment claim. Miller has not produced sufficient evidence to establish an essential element of the claim that the working environment was so intolerable a reasonable person would be compelled to quit.

Miller also argues that the lack of remedial action on the party of Tyson management, which permitted the harassment to continue, left

Miller with no choice except to resign his employment. In *Kilgore v. Thompson & Brock Mgt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996), the Eleventh Circuit held that an employer is entitled to summary judgment on a constructive discharge claim if the employee does not give the employer sufficient time to remedy the situation. As discussed above, Miller never made any efforts too seek redress under the complaint procedure provided in the Consent Decree. Miller's decision to ignore the procedures laid out in the Consent Decree and to quit was based solely on his own unfounded opinion that the complaint procedure would be ineffective. Miller did not return to work after he complained to the proper officials at Tyson. He did not allow sufficient time for Tyson to remedy the situation if this was a situation that called for its attention.

Lastly, Miller is claiming that he was retaliated against by Tyson. To establish a *prima facie* case of retaliation, a plaintiff must show: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) the adverse action was casually related to the protected expression. *See Weaver v. Casa Gallardo*, 922 F.2d 1515, 1524 (11th Cir. 1991). It is undisputed that Miller engaged in protected activity, in that, he filed an EEOC charge alleging discrimination in 1998. However, Tyson argues that Miller connot make a sufficient showing on the other two elements of his *prima facie* case.

Tyson asserts that the trivial incidents about which Miller complains are not "objectively serious and tangible enough" to give rise to a retaliation claim. *See Gupta v. Florida Board of Regents*, 212 F.3d 571, 583 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001). In *Gupta* the court held that an adverse employment action is an ultimate employment decision, such as discharge, failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment. *Id.* at 587. The court recognized that in evaluating whether actions meet the required level of substantiality Title VII is not a general civility code nor a statute making actionable the ordinary tribulations of the workplace. *Id.* Miller argues that the adverse employment action he was subjected to was a hostile work environment and constructive discharge. Miller failed to produce any evidence that the individuals who allegedly created the "hostile work environment" even knew that Miller had previously filed an EEOC charge in 1998 or that he had

filed on in 2000. Furthermore, the acts of fellow employees with no supervisory authority do not create liability for the employer unless encouraged or ratified, and there is no such evidence.

Miller also filed a motion for summary judgment in which he merely restates his claim for hostile work environment, constructive discharge, and retaliation. Miller's summary judgment motion is due to be denied because the court is granting Tyson's motion for summary judgment on all of Miller's claims. Miller suggests that, in the alternative, the court should find that Tyson violated the Consent Decree and Miller is entitled to a trial on the issue of damages for this violation. Miller has refused to follow the procedures in the Consent Decree and he cannot now pursue a claim under the Consent Decree.

Conclusion

This court, by separate order, will grant Tyson's motion for summary judgment and deny Miller's motion for summary judgment.

DONE this 16th day of September, 2002.

S/William M. Acker, Jr.
United States District Judge

IN THE UNDITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CORDELL MILLER,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	
	)	01-AR-0701-S
TYSON FOODS, INC,	)	
	)	
Defendant	)	

ORDER

In accordance with the accompanying memorandum opinion, the court finds that there are no genuine disputes of material fact and that defendant, Tyson Foods, Inc., is entitled to judgment as a matter of law. Therefore, defendant's Rule 56 motion is GRANTED and the Rule 56 motion of plaintiff, Cordell Miller, is DENIED. Consistent with this ruling, the action of plaintiff is DISMISSED WITH PREJUDICE.

Costs are taxed against plaintiff.

DONE this 16th day of September, 2002

S/William M. Acker, Jr.
United States District Judge

IN THE UNDITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CORDELL MILLER,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	
	)	01-AR-0701-S
TYSON FOODS, INC,	)	
	)	
Defendant	)	

ORDER

On May 10, 2002, a paper entitled "Notice of Appeal and/or in the Alternative Interlocutory Appeal and/or Petition for Writ of Mandamus with Accompanying Motion to Stay Execution of Order" was filed in the above-entitled matter by Kenneth Wilson, who therein purports to be the attorney for plaintiff, but whose erroneous admission *pro hac vice* was vacated on May 3, 2002.

To the extent that this court has jurisdiction over a case in which a purported appeal to the Eleventh Circuit has been taken, the paper filed on May 10, 2002, is STRICKEN, as is the purported "Notice of Lien" filed by Kenneth Wilson on May 6, 2002. Interestingly, on May 6, 2002, Wilson calls himself "**former** counsel for plaintiff", whereas on May 10, 2002, he called himself "attorney for Cordell Miller." This order does not constitute any direction to the Clerk not to process the purported appeal as if it had been properly filed.

DONE this 13th day of May, 2002.

S/William M. Acker, Jr.
United States District Judge

cc: All Judges and Magistrate Judges of the Court.

Appendix G

IN THE UNDITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CORDELL MILLER,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	
	)	01-AR-0701-S
TYSON FOODS, INC,	)	
	)	
Defendant	)	

ORDER

The purported notice of appeal filed by Cordell Miller on October 15, 2002, is accompanied by an *in forma pauperis* affidavit. Although the court is satisfied that Mr. Miller lacks the financial capacity of paying the filing fee and other costs associated with an appeal, his appeal is so lacking in colorable merit and so obviously an attempt to reopen his case after the expiration of the time for a motion for new trial pursuant to Rule 59, F.R.Civ. P., that the court respectfully DENIES Mr. Miller's request for *in forma pauperis* status.

DONE this 17th day of October, 2002

S/William M. Acker, Jr.
United States District Judge

Appendix H